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IN THE

Supreme Court of the United States

October Term, 1950.

No. 109

RAYMOND M. CRANE, doing business as Associated Fruit Distributors,

Petitioner,

vs.

JOSEPH DENUNZIO FRUIT COMPANY, a corporation, and JOHN C. KAZANJIAN, doing business as Red Lion Packing Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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vs.

JOSEPH DENUNZIO FRUIT COMPANY, a corporation, and JOHN C. KAZANJIAN, doing business as Red Lion Packing Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Raymond M. Crane, doing business as Associated Fruit Distributors, respectfully prays that a writ of certiorari issue from this court, in the above entitled action, to review a final decision of the United States Court of Appeals for the Ninth Circuit rendered on April 16, 1951, a petition for rehearing having been denied on May 10, 1951.

Summary and Statement of Matter Involved.

This matter originated in a proceeding filed by Joseph Denunzio Fruit Company, a corporation, against Raymond M. Crane, doing business as Associated Fruit Distributors and John C. Kazanjian, doing business as Red Lion Packing Company, before the Secretary of Agriculture, under the Perishable Agricultural Commodities Act of 1930, as amended.

In its amended complaint Joseph Denunzio Fruit Company (hereinafter referred to as Denunzio) alleged that Raymond M. Crane, doing business as Associated Fruit Distributors (hereinafter referred to as Crane), either as principal or as agent for John C. Kazanjian, doing business as Red Lion Packing Company (hereinafter referred to as Kazanjian), or as both, contracted to sell to Denunzio three carloads of grapes at a price of $2.50 a box, that the grapes were never delivered and complainant was damaged in the sum of $5723.50. [R. pp. 17-28.]

Crane, by answer, denied acting as either principal or agent for Kazanjian and alleged that he was acting solely as a buying broker for Denunzio; denied that a valid contract was entered into; alleged that negotiations were had leading up to the sale of said grapes but certain stipulations were never complied with, that a confirmation of sale had never been signed or a deposit of $750.00 per car made; that as a buying broker for Denunzio, Crane was to receive $50.00 a car as a procurement charge; that he had no financial interest in the transaction other than the procurement charge. [R. pp. 49-52.]

Kazanjian, by answer, denied entering into the contract. [R. pp. 53-62.]

After the trial before the Department, an order was made by the Secretary of Agriculture ordering Crane to pay to Denunzio the sum of $5723.50, together with interest from December 10, 1944, at 5% per annum until paid. [R. p. 79.]

Crane thereupon appealed to the United States District Court for the Southern District of California, Central Division, and a trial *de novo* was had before the Honorable J. F. T. O'Connor, Judge of said court.

During the trial of the action before Judge O'Connor, he signified that he would hold Crane to be the agent of Kazanjian and not the procuring broker or agent of Denunzio, and counsel for Crane thereupon contended that if Crane was acting as agent for Kazanjian, then the payment by Denunzio of $2.50 a box for the grapes, plus $50.00 per car commission to Crane (Kazanjian's agent) constituted payment by Denunzio for said grapes of a price in excess of the O. P. A. ceiling and the contract was null and void and unenforceable. [R. p. 120.]

Judge O'Connor held the contract to be valid and enforceable and affirmed the order of the Secretary of Agriculture and awarded Denunzio an attorneys' fee in the sum of $3000.00 for the services of its attorneys in defending Crane's appeal. [R. pp. 139-152.]

Crane filed a motion for a new trial but before the same could be heard Judge O'Connor died.

Thereafter said motion was presented to Judge James M. Carter and Judge Carter held that the ceiling price of

said grapes was $2.50 a lug; that the contract sued upon was for the sale of merchandise at a price in excess of the O. P. A. ceiling and void and unenforceable; that a new trial was not necessary, and the court thereupon ordered that said action be dismissed. [R. pp. 164-184.]

Denunzio appealed from the ruling of said Judge Carter and the United States Court of Appeals for the Ninth Circuit on April 16, 1951, rendered a decision vacating the conclusions of law entered by Judge Carter and setting aside and reversing the judgment rendered by him "with directions to reinstate the findings of fact, conclusions of law and judgment of Judge O'Connor." A petition for rehearing was denied May 10, 1951. [R. pp. 268-274.]

Statement Disclosing Basis of Jurisdiction of Supreme Court.

This proceeding was filed before the Secretary of Agriculture of the United States Department of Agriculture under a Federal law, viz: the Perishable Agricultural Commodities Act of 1930, as amended, and under the provisions of said Act the United States District Court had jurisdiction to review the decision of the Secretary of Agriculture on a trial *de novo.*

The United States Court of Appeals had jurisdiction to review the decision of the United States District Court.

The Supreme Court has jurisdiction to review any judgment of the United States Court of Appeals.

The Questions Presented.

1. Is a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, valid and enforceable?

2. Can a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, be the basis of an action for damages by the buyer against the seller, where the seller refuses to carry out said contract?

Reasons Relied Upon for the Allowance of a Writ.

This court should issue the writ herein prayed for, for the following reasons:

1. The Court of Appeals by ordering the reinstatement of the findings of fact, conclusions of law and judgment of Judge O'Connor, in effect held that a contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act is (1) valid and enforceable, and (2) can be the basis of an action for damages by the buyer, where the seller refuses to carry out the contract. This holding is erroneous and without support in Federal and State court decisions.

2. The question presented herein as to the right to sue for damages for breach of an unlawful contract is

an important question of Federal law which has not been, but should be, settled by this court.

3. In sustaining the ruling of Judge O'Connor as to the validity and enforceability of the contract in question the Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this court.

4. The ruling of the Court of Appeals sustaining the judgment of Judge O'Connor is contrary to decisions of various State courts of last resort.

5. To clarify an uncertainty arising out of the opinion of this court in the case of *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 91 L. Ed. 1219.

Wherefore, your petitioner respectfully prays that a writ of certiotrari be issued out of, and under the seal of, this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket as "JOSEPH DENUNZIO FRUIT COMPANY, a Corporation, Appellant and Cross-Appellee, vs. RAYMOND M. CRANE, doing business as Associated Fruit Distributors, Appellee, and Cross-Appellant, JOHN C. KAZANJIAN, doing business as Red Lion Packing Company, a Corporation, Appellee, No. 12,662," and that said judgment of the Court of Ap-

peals may be reversed by this Honorable Court and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper, and your petitioner will ever pray.

BENJAMIN W. SHIPMAN,
Counsel for Petitioner.

HENRY O. WACKERBARTH,
Of Counsel.

Certificate of Counsel.

Benjamin W. Shipman, counsel for petitioner in the above entitled proceeding, does hereby certify that the foregoing petition is well-founded and not interposed for delay.

BENJAMIN W. SHIPMAN.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below and of Secretary of Agriculture.

The order of the Secretary of Agriculture is dated February 26, 1947, and his decision is reported in 6 Agricultural Decisions 139. [R. pp. 63-79.]

The judgment of Judge O'Connor was docketed July 21, 1948, and his opinion is reported in 79 Fed. Supp. 117. [R. pp. 82-137, 139-152.]

The judgment of Judge Carter was entered May 19, 1950, and his opinion is reported in 89 Fed. Supp. 962. [R. pp. 164-184.]

The decision of the United States Court of Appeals was rendered and filed April 16, 1951. [R. pp. 268-274.]

The petition for rehearing was filed May 9, 1951, and denied May 10, 1951. [R. p. 274.]

II.

Jurisdiction.

The jurisdiction of the Secretary of Agriculture to determine the matter presented to him is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499 (f) (g).

The jurisdiction of the United States District Court to hear and determine, on a trial *de novo,* the appeal from the reparation order of the Secretary of Agriculture, is set forth in the Perishable Agricultural Commodities Act of 1930, as amended, 7 U. S. C. A., Section 499(g).

The jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is set forth in Section 128 of the Judicial Code, 28 U. S. C. A., Section 1291.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of the United States Court of Appeals is set forth in Section 240 of the Judicial Code, 28 U. S. C. A., Section 1254.

III.

Statutes and O. P. A. Regulations Involved.

This proceeding involves the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. Appx. Sec. 901, *et seq.*) and also Maximum Price Regulation No. 426 promulgated by the Price Administrator (Fed. Reg. 1943, pp. 16409-16411).

Section 901(a) of the Act provides that it is in the interests of national defense and security and necessary to the effective prosecution of the present war and that the purposes of said Act are to "stabilize prices."

The Act empowers the Price Administrator to establish maximum prices (Sec. 902).

Section 904(a) of the Act provides as follows:

> "It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, * * * or otherwise to do or omit to do any Act in violation of any regulation or order under Section 2 * * * or of any price schedule effective in accordance with the provisions of Section 206 * * * or any regulation * * * or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 921(a) of the Act provides for the creation of the Office of Price Administrator and subdivision (d) provides:

> "The Administrator may, from time to time issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Section 925(a) authorizes the Administrator to apply to the courts to enjoin violations of the Act and authorizes injunctions.

Subdivision (b) authorizes fines and imprisonment for violation of the Act.

Subdivision (c) confers jurisdiction upon the District Court in the criminal proceedings for violation of Section 4 of the Act and concurrent jurisdiction with all other proceedings.

Subdivision (d) precludes damages and penalties when persons act in good faith.

Subdivision (e) authorizes purchasers of commodities sold in violation of the regulations to bring actions against the seller on account of overcharge and authorizes recovery of three times the overcharge, and also authorizes the Administrator to sue where the purchaser does not sue.

Subdivision (f) confers certain powers on the Administrator.

Subdivision (g) authorizes the District Court to enjoin orders of the Administrator.

Maximum Price Regulation 426 (Fed. Reg. 1943, pp. 16409-11) contains the following provisions:

> "Sec. 7. PROHIBITION AGAINST SALES ABOVE MAXIMUM PRICES.
>
> On and after July 20, 1943, regardless of any contract or other obligation, no person shall sell or deliver, and no person, in the course of trade or business shall buy or receive fresh fruits and vegetables at

prices higher than the maximum prices established by this regulation, and no person shall agree, offer, solicit, or attempt to do any of the foregoing. Lower prices than the maximum may be charged and paid.

* * * * * * * *

Sec. 9. ENFORCEMENT. Persons violating any provisions of this regulation are subject to criminal penalties, civil enforcement actions, suits for treble damages and proceedings for suspension of licenses provided for by the Emergency Price Control Act of 1942, as amended.

* * * * * * * *

Sec. 11. EVASION. The price limitations which are set forth in this regulation shall not be evaded, whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity, or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise."

Maximum Price Regulation 426, Amendment 46 (Fed. Reg. 1944, pp. 9509-10-11) sets forth "maximum prices for table grapes." Items 3 to 6, columns 1 and 2, refer to grapes produced in Tulare County, California, with a net lug weight of 28 pounds or more. Column 3 refers to sales by lugs and column 5 refers to season from December 11th to end of season and establishes the maximum base price at $2.40.

The allowable markups over the base prices are set forth in Table A (Fed. Reg. p. 9511). The second set of figures of columns 1, 2 and 3 refer to grapes produced in Tulare County, California, with lugs of 28 pounds or

over (Items 3 to 10, Table 2). Column 4 establishes a markup of 3¢ where a grower-packer sells "Through a broker in any quantity or through a commission merchant in carlots or trucklots."

Table A, columns 8 to 12, refer to "Sales by any person (including grower-packers) through a grower's sales agent and sales by shipping point distributors" and establishes a 10¢ markup.

IV.

Statement of Facts.

A statement of the matters presented to the Secretary of Agriculture, the United States District Court and the United States Court of Appeals is set forth in the petition for writ of certiorari, under the heading "Summary and Statement of Matters Involved," and the same is hereby adopted and made a part of this brief.

The facts are as follows:

Denunzio is a car-lot receiver, jobber and service wholesaler having its place of business at Louisville, Kentucky; A. B. Rains, Jr., is a food broker at Louisville, Kentucky; Crane is a broker or car-lot distributor having his place of business at Los Angeles, California; Kazanjian is a grower and packer at Exeter, California, and also operates as a broker. [R. pp. 139, 140, 171 and 172.]

Exeter is located in Tulare County, California.

On September 26, 1944, Crane sent a form telegram to thirteen different brokers throughout the United States, stating that he could book eighteen cars of Emperor grapes, the same to go in storage commencing October 9th, shipper to transfer title on or after December 10th, packed 28 pounds net, he paying all storage charges, $500.00

part payment with confirmation, price $2.53 net to shipper, Crane charging $50.00 per car procurement charge. The telegram contained the code word "Adlam" which means "offer subject to confirmation." One of these form telegrams was sent to A. B. Rains, Jr., of Louisville, Kentucky. [R. pp. 198-202.] In a teletype conversation which followed between Crane and Rains on September 28th, Rains offered to take four cars of grapes on terms different than offered. Crane replied that the matter would have to be put up to the shipper as the deal was based exactly as we told you. [R. p. 227.]

On September 28th Crane wired Rains that it was impossible to make a deal except as quoted in his night letter (referring to his night letter of September 26th). [R. p. 203.]

On October 2nd Crane sent out another form telegram to the same brokers referring to the night letter of September 26th and quoting fifteen cars U. S. One at $2.50 net on the same deal, asking for the parties to wire quick if they wanted any part of the deal. [R. p. 205.] As the result of a teletype conversation between Crane and Rains concerning the offers to sell Emperor grapes, Rains approved a sale of three cars to Krotzki, another commission merchant that he represented [R. p. 230] and thereafter and on October 2nd Crane telegraphed Rains as follows:

> "Talked shipper Red Lyon Packing Company Confirms Kortski Necessary 750.00 car airmail deposit with signed confirmation Emperors available now Only two more cars possibly three same base." [R. p. 206.]

In a teletype conversation which occurred on October 3rd between Rains and Crane, each party orally confirmed

two cars to Krotzki and three cars to Denunzio, and Crane stated that they would airmail confirmations for buyer's signature, and Rains stated he would airmail checks with signed confirmation when he received your (Crane's) copies. [R. p. 234.]

On October 3rd Rains mailed Crane a Standard Memorandum of Sale showing two cars of grapes sold to Denunzio for account of Associated Fruit Distributors. [R. pp. 236-7-8.]

On October 3rd Crane wired Kazanjian the facts with reference to the purchases and Kazanjian wired back stating they were satisfactory but injecting some new terms into the deal. [R. pp. 217-8.]

On October 10th Crane wired Rains:

> "Shipped (r) Red Lion takes view account ceiling lifted any contracts Emperors voided * * *." [R. p. 209.]

Kazanjian refused to ship the grapes.

V.

Specifications of Error.

The Court of Appeals erred:

1. In setting aside and vacating the conclusions of law entered by Judge Carter and reversing the judgment entered by him.

2. In reinstating the findings of fact, conclusions of law and judgment of Judge O'Connor.

3. In sustaining the ruling of Judge O'Connor holding that the contract for the sale of grapes at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act of 1942, as amended, is valid and enforceable.

4. In sustaining the ruling of Judge O'Connor holding that an action for damages will lie for the breach of a contract for the sale of grapes at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act of 1942, as amended.

VI.

Summary of Argument.

Point "A". A contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act is void and unenforceable.

Point "B". A contract for the sale of merchandise at a price in excess of the ceiling established by the Price Administrator under the provisions of the Emergency Price Control Act, cannot be the basis of an action for damages by the buyer against the seller, where the seller refuses to carry out the contract.

Point "C". The payment of the O. P. A. ceiling to the seller and the payment of a commission to the seller's agent voided the contract.

Point "D". The equities of this case demand a reversal of the Court of Appeals judgment.

Point "E". Decisions under the Sherman Anti-Trust Act hold contracts entered into in violation thereof to be void and unenforceable.

Point "F". The decision of this Court in the case of *Bruce's Juices v. American Can Co.* does not hold that the seller may recover damages for breach of an unlawful contract.

Point "G". Contentions urged by Denunzio before the Court of Appeals are without merit.

ARGUMENT.

POINT A.

A Contract for the Sale of Merchandise at a Price in Excess of the Ceiling Established by the Price Administrator Under the Provisions of the Emergency Price Control Act Is Void and Unenforceable.

Under Section III hereof we quoted Section 904(a) of the Emergency Price Control Act wherein Congress stated it shall be "unlawful" to sell or deliver or to buy or receive any commodity or to do any act in violation of any regulation or order or price schedule or to offer to do so.

Maximum Price Regulation 426, Section 7, prohibits the sale or purchase of fruits or vegetables at prices higher than the maximum prices established by said regulation, and Section 9 provides for enforcement of the Act by criminal penalties, civil enforcement actions, suits for treble damages and for suspension of licenses, and Section 11 provides that the price limitations are not to be evaded by direct or indirect methods or by way of commission. (Sec. III hereof for text of regulations.)

The effect of the statute and regulations upon a contract in violation thereof, is to make the same void and unenforceable.

The general rule with reference to unlawful contracts and the effect of illegality is set forth in 12 Am. Jur., page 652, *et seq.*, as follows:

> "It is a general rule that an agreement which violates a provision of a Constitution or of a constitutional statute or which cannot be performed without violation of such a provision is illegal and void. * * * This is the general rule whether the con-

sideration to be performed or the act to be done is unlawful. Thus, a promise made in consideration of an act which is forbidden by the United States Constitution is illegal. An agreement in violation of a law is illegal whatever may have been theretofore decided by the courts to have been the public policy of the country on the subject." (Sec. 158.)

"So far as contracts in violation of statute are concerned, it may be said, speaking generally, that there is no distinction between acts *mala in se* and acts *mala prohibita*. Where a statute intends to prohibit an act, it must be held that its violation is illegal, * * *. It is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing is prohibited because it is against good morals or because it is against the interest of the state. * * *" (Sec. 159.)

"An agreement directly and explicitly prohibited by a constitutional statute in unmistakable language is ordinarily void and no recovery can be had thereon. When a contract, express or implied, is tainted with the vice of violation of law as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice. Moreover, where one of the parties thereto has performed in whole or in part, he cannot avoid the contract and recover reasonable compensation.

It makes no difference whether the prohibition or command is expressed or implied. Even where the statute does not, in express terms, declare the act unlawful, yet if it appears, from a consideration of the terms of the legislation in question that the legislative intent was to declare the act unlawful, an agreement involving the doing of such an act is illegal. * * *" (Section 160.)

In the case of *Case v. Bowles* (1945), 327 U. S. 92, 90 L. Ed. 552, this Court held that the price regulations applied to timber on school lands sold by the State and enjoined a sale in excess of the maximum price regulations.

In the case of *Hulbert and Bowles v. Twin Falls County* (1946), 327 U. S. 103, 90 L. Ed. 560, this Court granted certiorari to review a decision of the Idaho Supreme Court because it conflicted with the decision of the Ninth Circuit Court in the case of *Bowles v. Case.* In this case Twin Falls County sought to recover $1050.00 as the purchase price of a tractor. The O. P. A. ceiling price was $723.56. The Idaho District Court held "that the sale as to the amount above that ceiling price was void." The Idaho Supreme Court reversed the District Court and this Court reversed the Idaho Supreme Court.

In the case of *Hall v. Bucher* (1950, Mo.), 227 S. W. 2d 96, plaintiff sought to recover money claimed to be due for the sale of corn. It was agreed that the price should be the highest ceiling price during a certain period. At the date of the sale the ceiling price was $1.08 a bushel which the purchaser paid. During the period referred to in the contract the ceiling price rose to $1.33⅓ a bushel. This action was to recover the difference. Defendant contended that the provision of the contract for adjusting the price upward was in violation of O. P. A. regulations. The Court held the contract for price adjustment to be void and denied recovery. The plaintiff contended that defendant induced him to enter into the contract and therefore he could not plead illegality, but Court rejected this contention stating "the law permits a party to an illegal agreement to set up the illegality as a defense even though it may be alleging his own turpitude."

In the case of *Dippel v. Brunozzi* (1950), 365 Pa. 264, 74 A. 2d 112, the Supreme Court of Pennsylvania stated with reference to Section 904 of the Emergency Price Control Act:

> "Therefore such a sale or such a purchase, during the time when the act was in effect, was against public policy and consequently unenforceable. This accords with the general rule that an agreement which violates a provision of a statute, or which cannot be performed without violation of such provision is illegal and void."

In the case of *International Spangles Corp. v. Marrow Mfg. Co.* (1945), 294 N. Y. 295, 62 N. E. 2d 77, the Court of Appeals of the State of New York denied a recovery for merchandise sold and delivered where plaintiff failed to show it had established a maximum price for the merchandise in accordance with the Emergency Price Control Act holding that the contract was legally unenforceable.

In the case of *Walker v. Bailey* (Ala., 1947), 33 So. 2d 891, the Court considered an action to recover possession of an automobile and money due on a chattel mortgage. Defendant contended the price of the automobile was in excess of O. P. A. ceiling. In denying recovery the Court stated:

> "In our opinion it is clear that under the provisions set out above that the mortgage and note which are the basis of this suit are illegal and void. The contract calling for the payment of a price above the O. P. A. ceiling is declared unlawful. A penalty is fixed for such actions. A prohibition must be implied under such conditions (citing cases). Contracts specially prohibited by law, or the enforcement of

> which violates the laws enacted for regulation and protection of private citizens are void and non-enforceable in the courts of this state (citing cases). * * * The expressed purpose and provisions of the Emergency Price Control Act we think establishes beyond argument the illegality of contracts made in violation of its provisions. Relief sought under contracts unlawful under the Emergency Price Control Act has uniformly been denied in other jurisdiction" (citing cases). (Alabama Supreme Court review denied, 33 So. 2d 898.)

In the cases of *Gales v. Wallace* (Ark., 1946), 194 S. W. 2d 881, *Scott Furniture Co. v. Maurer* (Ark., 1945), 187 S. W. 2d 185, and *El Paso Furniture Co. v. Gardner* (Texas), 182 S. W. 2d 818, plaintiffs sought to recover possession of personal property sold on a title retaining contract—the sale price being over O. P. A. ceiling. In each instance the purchaser had paid under the contract an amount equaling or in excess of ceiling. In each case the Court held plaintiffs were not entitled to any relief.

In the case of *Lewis v. Jackson* (Texas, 1947), 199 S. W. 2d 853, plaintiff sought to recover possession of an auto sold in excess of O. P. A. ceiling. Plaintiff had taken back a chattel mortgage for a part of the purchase price. The Court held the transaction to be void.

In the case of *MacRae v. Heath*, 60 Cal. App. 64, 212 Pac. 228, the Court considered the question of validity of a contract for sale of frozen fruit. The law made it unlawful to sell frozen fruit. With reference to the right to recover for frozen fruit sold and delivered to the purchaser, the Court stated that the sale is void because the

statute expressly declares it so and held that plaintiff could not recover the contract price.

In the case of *Takeuchi v. Schumuck,* 206 Cal. 782, 276 Pac. 345, the plaintiff sought to recover certain money paid as a deposit on account of the purchase price of real property. The Court denied any recovery on the ground that the attempted purchase was in violation of the Alien Land Law and illegal.

In the case of *Silverthorne v. Percey,* 120 Cal. App. 83, 71 P. 2d 746, plaintiff sought to recover a broker's commission for negotiating an exchange of real property. The agreement for the exchange of real property was illegal, as it was an attempt to sell a parcel of property by reference to an unrecorded map. The Court held that the plaintiff was not entitled to recover a commission for negotiating an illegal contract of sale.

In the case of *Kings, etc. v. Yucaipa, etc.,* 18 Cal. 2d 47, 62 P. 2d 1064, the Court held that the contract to store perishable commodities at a price less than the tariff filed with the Railroad Commission was illegal, the law expressly forbidding such contracts, and making them illegal and void. The Court denied any recovery for the warehouse charges, and denied recovery by the party storing the merchandise for claimed negligence in handling the merchandise in storage.

Clearly under the foregoing authorities the sale in question being in excess of a ceiling price was void and unenforceable.

The decision of the Court of Appeals is in conflict with the rule laid down by this Court in the case of *Hulbert and Bowles v. Twin Falls County, supra,* and the various state court decisions hereinbefore referred to.

POINT B.

A Contract for the Sale of Merchandise at a Price in Excess of the Ceiling Established by the Price Administrator Under the Provisions of the Emergency Price Control Act, Cannot Be the Basis of an Action for Damages by the Buyer Against the Seller, Where the Seller Refuses to Carry Out the Contract.

The question presented herein is an important question of Federal Law which has not been, but should be, settled by this Court.

Congress provided that a contract in violation of O. P. A. Regulations is unlawful. A contract declared to be unlawful is illegal, void and unenforceable and cannot be the basis of an action to recover damages for the breach thereof.

The only cases which we have been able to find deciding this Federal question decide same contrary to the decision of the Court of Appeals.

In the case of *Morgan Ice Co. v. Barfield* (Tex. Ct. of Civil Appeals 1945), 190 S. W. 2d 847, plaintiff sought to recover damages for the failure of defendant to deliver ice pursuant to an agreement of sale. The sales price was in excess of the O. P. A. ceiling. On appeal the Court held that the contract in question "was in violation of and prohibited by the Federal statutes and directives of the Office of Price Administration and, therefore, illegal and void." In denying recovery the Court quoted

from Section 904(a) of the Emergency Price Control Act and stated:

> "The rule is, both under the Federal and State authorities, that where parties who are charged with the knowledge of the law (the Act above referred to and the rulings and ceiling prices fixed pursuant to its provisions constitute the law), undertake to enter into a contract in violation thereof they will be left in the position in which they put themselves. The courts will not permit a recovery to either side. (Citing cases.) Before appellee would be permitted to recover damages for the breach of a contract the duty rested upon them to establish a legal contract.
>
> When the evidence shows the contract relied upon by a party is prohibited by law and therefore illegal, the courts are duty bound to dismiss such controversy, thereby denying relief to either party."

In the case of *Palmer v. Mayer* (1947), 330 Ill. App. 619, 71 N. E. 2d 822, the Court held where the purpose of a contract was to defeat the operation of the Emergency Price Control Act and regulations of the Office of Price Administration with reference to sugar and both parties to the contract knew that they were engaging in an unlawful undertaking, no recovery could be had for breach of the contract by one of the parties.

In the case of *Perma-Stone Corp. v. Merkel,* 255 Wis. 565 (1949), 39 N. W. 2d 730, plaintiff sought to foreclose a mechanic's lien for labor and materials furnished to defendant. Defendant contended the price charged

was in excess of O. P. A. ceiling. The Court denied foreclosure of the lien but awarded damages for breach of contract. In reversing the judgment the Court stated: "Plaintiff's violation of O. P. A. regulations pertaining to price is a defense in a civil action to recover damages for breach of contract."

This is not an action to recover the purchase price or the reasonable value of merchandise sold and delivered. On the contrary, it is an action to recover damages (profits Denunzio would have made) for the failure of Crane to carry out an unlawful contract. Denunzio's action is based upon an unlawful contract.

The effect of the decision of the Court of Appeals is that a seller must go through with a contract to sell merchandise at a price in excess of ceiling and subject himself to (1) criminal penalties; (2) a civil enforcement action; (3) a suit for treble damages, and (4) the suspension of his license to operate a business. A seller must subject himself to all of these burdens so that a buyer may make a profit and also recover three times the excess over the O. P. A. ceiling.

Certainly Congress never intended that such was to be the interpretation placed on one of its laws declaring a contract to sell merchandise in excess of the O. P. A. ceiling to be unlawful.

POINT C.

The Payment of the O. P. A. Ceiling to the Seller and the Payment of a Commission to the Seller's Agent Voided the Contract.

As pointed out under the statement of facts, Kazanjian was to receive $2.50 a lug for the grapes and Crane was to receive a commission of $50.00 a car, which amounted to $.0454 a lug, as found by Judge Carter. [R. p. 177.]

As pointed out under the statutes and regulations involved, the ceiling price was $2.50 a lug for a sale by Kazanjian or by Crane.

Maximum Price Regulation 426, Section 11, provides that "the price limitations * * * shall not be evaded by way of commission * * * or any other charge * * *."

The payment of the ceiling price to the seller and a commission to the seller's agent was, in effect, a payment of the total amount to the seller and the contract thereupon violated the price regulations.

In the case of *Fowler v. Equitable Trust Co.*, 141 U. S. 385, 35 L. Ed. 786, the Court held that an agreement to pay the highest rate of interest under the law to a lender of money and the payment by the borrower to the lender's agent of a commission for making the loan constituted a payment to the lender in excess of the lawful rate and "rendered this loan usurious."

In the case of *Walker v. Bailey* (Ala.), 33 So. 2d 891 the Court held that the payment by the purchaser of a part of the purchase price to the seller and a part to his agent (both amounts when added together exceeding the O.P.A. ceiling) made the contract illegal and unenforceable.

In the case of *Blumenthal v. U. S.*, 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154, this Court sustained a conviction for conspiracy to violate the Emergency Price Control Act in the sale of liquor where the seller was paid ceiling and certain of his intermediaries received various sums of money for their part in the transaction.

The effect of the agreement for the buyer to pay the seller the ceiling price and the seller's agent a commission, constituted a payment to the seller of a total price in excess of the ceiling and voided the contract.

POINT D.

The Equities of This Case Demand a Reversal of the Court of Appeals Judgment.

Crane offered to book grapes for Denunzio if Denunzio would pay him a procurement fee of $50.00 a car. $500.00 part payment was to be made with confirmation. [R. p. 202.] Crane never represented himself to be the owner or shipper and informed Denunzio that its counter offer must be put up to shipper. [R. p. 227.] Denunzio never paid the part payment due on confirmation. In fact he never paid anything on account of the grapes nor did he pay Crane his procurement charge. No contract for the sale of grapes was ever signed and no confirmation given as required by Crane's telegram of September 26, 1944. [R. pp. 219-20.]

Although Crane could only have made $150.00 on the deal, he was denied this amount and burdened by a judgment for $5723.50, plus interest and an attorney's fee allowed to Denunzio in the sum of $3000.00.

The equities of the case demand that this judgment be reversed.

POINT E.

Decisions Under the Sherman Anti-Trust Act Hold Contracts Entered Into in Violation Thereof to Be Void and Unenforceable.

We believe that the decisions of this Court interpreting the Sherman Anti-Trust law should be persuasive of the decision to be rendered interpreting the Emergency Price Control Act.

The Sherman Anti-Trust law provides, among other things, that every contract in restraint of trade or commerce "is hereby declared to be illegal" and also for the recovery of treble damages for a violation thereof (26 Stat. 209, Chap. 646, and Chap. 647(m); 50 Stat. 673-93, Chap. 690; 15 U. S. C. A. Section 1, 4 F. C. A. Title 15, Section 1; 38 Stat. 730, 731, Chap. 323; 15 U. S. C. A. Sections 1, 2, 7, 15, 4 F. C. A. Title 15, Sections 1, 2, 7, 15).

In the case of *Sola Electric Company v. Jefferson Electric Company,* 317 U. S. 173, 87 L. Ed. 165, the Jefferson Electric Company sought to recover certain royalty payments due under a license agreement covering a patented article. The Sola Electric Company contended that the agreement for licensing was in violation of the Sherman Anti-Trust law. In denying recovery the Court stated as follows:

> "* * * petitioner may assert the illegality of the price-fixing agreement and may offer any competent evidence to establish its illegality, including proof of the invalidity of the patent."

In the case of *Continental Wall Paper Co. v. Louis Voight, etc.* 212 U. S. 227, 53 L. Ed. 486, petitioner sought to recover for goods, wares and merchandise sold and delivered. Defendant alleged that the plaintiff was the selling agent of a combination of wall paper manufacturers and that in carrying out such combination the defendants were compelled to sign a jobber's agreement which in effect bound them to buy from the plaintiff all the wall paper needed in their business at certain fixed prices, and not to sell the same at lower prices or upon better terms than those upon which the plaintiff itself sells to dealers other than the jobbers. The defendant further alleged that the goods sued for were ordered pursuant to such agreement and at the prices fixed and that such prices were unreasonable and that the transactions between the parties were in furtherance of an illegal combination. In sustaining the defense the Supreme Court stated the rule as follows:

> "The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination."

See also:

Bennett v. National, Etc., 186 U. S. 70, 46 L. Ed. 1058.

It will thus be seen that under the Sherman Anti-Trust Act the Courts hold that a contract entered into in violation of the Act is void and unenforceable even though the Act itself provides for a recovery of treble damages.

This rule as applied to the case at bar would justify this Court in holding the contract relied upon to be illegal and not the basis of an action for damages for failure to deliver under the void contract.

POINT F.

The Decision of This Court in the Case of Bruce's Juices v. American Can Co. Does Not Hold That the Seller May Recover Damages for Breach of an Unlawful Contract.

In the brief of Denunzio before the Court of Appeals it took the position that contracts in violation of the statutes, where the phraseology is similar to that used in the Emergency Price Control Act, have been held enforceable and cited the decision of this Court in the case of *Bruce's Juices v. American Can Co.,* 330 U. S. 743, 91 L. Ed. 1219, as supporting this contention. The same argument was advanced in the case of *Walker v. Bailey,* hereinafter referred to.

We submit that the *Bruce's Juices* case does not sustain this contention and that other courts in analyzing said case have so held.

In the *Bruce's Juices* case the American Can Company sought to recover $114,000.00 on certain renewal notes, the originals of which were given for the purchase price of cans sold and delivered to Bruce's Juices. Bruce's Juices contended that the consideration for the notes was illegal and that the notes were void for the reason that the Can Co. had sold cans to others at prices which discriminated against Bruice's Juices, thereby violating the Robinson-Patman Act. Section 3 of the Robinson-Patman Act makes it "unlawful" for any person to be a party to any sale which discriminates against competitors of a purchaser, by granting discounts, etc. In the course of the majortiy opinion the Court considers the question as to whether or not the sanctions provided by the Act prevent collection of the purchase price. A violation of the Act is made a crime and a person injured is given the right to recover threefold damages sustained by him. The majority opinion allowed recovery. In analyzing the evidence the Court pointed out that "It cannot be said that the notes represent the separate items of price discrimination." It further pointed out that "the violation, if there was one, is not inherent in the contract sued upon, whether it be the notes or the sale of the goods, but can only be found in different transactions which a party to the litigation had with third persons."

While there is considerable argument in the Court's opinion as to whether or not the claim of illegality would prevent recovery on the notes, the Court takes the position that the illegality did not arise out of the sale of cans and

therefore the seller was entitled to recover the purchase price.

That this Court only held that a purchaser could not secure merchandise and refuse to pay for same on the ground that the sale was illegal, is shown in the analysis of this Court's opinion by the United States Courts of Appeal for the Second and Seventh Circuits.

In speaking of the case of *Bruce's Juices* the 2nd Circuit stated (*Vines v. General Outdoor Advertising Co.*, 171 F. 2d 487) that case "held that the buyer of goods from a seller, who is engaged in violating such a statute, may not keep the goods without paying the price. The theory was that the seller's unlawful enterprise did not forfeit his title to the goods and that, since the buyer got his own title from the seller, he was obliged to conform to the conditions imposed upon its transfer."

In the case of *Turner Glass Corp. v. Hartford Empire Co.*, 7th Circuit, 173 F. 2d 49, the Court cited the *Bruce's Juices* case as supporting "the proposition that the courts recognize the distinction between inherent and collateral illegality arising out of anti-trust violations * * *. But when the contract sued upon is not intrinsically illegal, the court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violation of the Sherman Act not inhering in the particular contract in suit * * *."

In the case of *Walker v. Bailey* (Ala. 1947), 33 So. 2d 891, the Court considered an action to recover the pos-

session of an automobile and money due on a chattel mortgage. Defendant contended the price of the automobile was in excess of the O. P. A. ceiling. In this case defendant contended that because of the recent United States Supreme Court decision in the case of *Bruce's Juices v. American Can Co.* and in view of the action for treble damages given the purchaser of over-ceiling priced commodities under Section 925(c) that contracts violative of the Emergency Price Control Act should be enforced in full and the victimized purchaser left to his remedy under Section 925(c). With reference to this contention the Supreme Court of Alabama stated:

> "The fact that the purchaser is granted in a separate section a right to, and may, if he chooses, attempt to collect damages, where he is the victim of a sale involving over ceiling prices can in no way operate to validate a contract specifically declared unlawful by the act prohibiting such contracts. The expressed purpose and provisions of the Emergency Price Control Act we think establishes beyond argument the illegality of contracts made in violation of its provisions. Relief sought under contracts unlawful under the Emergency Price Control Act has uniformly been denied in other jurisdiction" (citing cases).

From the foregoing it will be seen that the *Bruce's Juices* case does not hold that a contract inherently illegal, that is a contract entered into in violation of the law, or declared to be unlawful, can be the basis of an action to recover on the contract.

POINT G.

Contentions Urged by Denunzio Before the Court of Appeals Are Without Merit.

In its brief before the Court of Appeals, Denunzio urged certain contentions and presented authorities in support of said contentions. The Court of Appeals did not set forth in its opinion the reason upon which it relied to reverse the judgment of Judge Carter. It therefore becomes necessary for us to discuss the arguments presented by Denunzio to the Court of Appeals and point out that they are not sufficient to defeat our claim of illegality and unenforceability of the contract relied upon.

The main contention of Denunzio before the Court of Appeals was that the Emergency Price Control Act, as amended, and the orders and regulations of the Price Administrator, set forth certain penalties for their violation and such penalties do not include the unenforceability of a contract made in violation thereof, therefore the contract is enforceable.

The first case cited by Denunzio under this point was the case of *Bentley v. Hurlbut,* 153 Cal. 796, 96 Pac. 890. In this case the Court recognized the rule that the penalty in the statute implies a prohibition and that no recovery can be had on a contract made in violation of a statutory prohibition, but stated that this rule is not without exception. In this case, however, the Court held that the contract in question did not violate the law and therefore recovery could be had thereon.

The next case referred to by Denunzio is the case of *Harris v. Runnels.* 12 How. 79, 53 U. S. 79, 13 Law. Ed. 901. In this case the Court recognized the rule that contracts in violation of statutes are void, but held that where

a purchaser of slaves received same he could not refuse to pay therefor even though the slaves had been illegally imported into the state in which they were sold.

The next case relied upon by Denunzio is the case of *Gammon v. Howard W. Scott, Inc.* (4th Circuit), 16 F. 2d 902. In this case the Court held that a non-resident corporation had a right to sue in the Federal Court and that this right could not be taken away by a state law.

The next case cited by Denunzio is the case of *Macco Const. Co. v. Farr* (9th Circuit), 137 F. 2d 52. This was an action for damages for breach of a contract to haul dirt which Macco was excavating. Without pleading illegality Macco at the trial contended that Farr was not entitled to recover because he had not obtained a permit from the Railroad Commission of California permitting transportation of property by trucks over public highways. Farr contended that the contract did not require the use of public highways and the trial court accepted this contention and found that the contract did not contemplate an illegal object.

The next case referred to by Denunzio is the case of *McBroom v. Scottish Mortgage, Etc.*, 153 U. S. 318, 14 S. Ct. 852, 38 Law. Ed. 729. This case holds that a contract for a loan providing for a usurious rate of interest is not void except for the interest in excess of that which could be lawfully charged, collected and received.

The next case referred to by Denunzio under this point is the case of *Miller v. Long Bell Lumber Co.* (Texas 1949), 222 S. W. 2d 244. This was an action to recover for merchandise sold and delivered. Miller contended that he was not liable for the reason that the lumber company had charged prices in excess of the O. P. A. ceiling. The

lumber company was awarded judgment for the amount for which Miller had been billed, less the sum by which said amount exceeded the O. P. A. ceiling. On appeal Miller contended that the case should be governed by the rule that courts will not lend their aid in support of illegal contracts. The Court held the overcharge to be unintentional and governed by that provision of the statute which provided merely for a return of the amount of the overcharge where same was unintentional.

The next case relied upon by Denunzio is the case of *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 91 L. Ed. 1219. This case has already been considered by us.

Denunzio then refers to certain cases involving licensing statutes but concedes that they are not directly applicable to the instant case, therefore we will not refer further to same.

Under this point Denunzio further goes into the matter of legislative history of the Emergency Price Control Act and points out that the House of Representatives' version of the bill provided that contracts in violation of the price ceiling under the bill were "unenforceable" and that the Senate's version of the bill provided for (1) injunction, (2) criminal penalties, (3) suit for damages, and (4) revocation of license and that after conference the Senate's version was adopted. This statement is not supported by the record nor by the references given by Denunzio. The Emergency Price Control Act, as finally enacted by Congress, provides "It shall be unlawful * * * for any person to violate the Act or any regulations or orders of the Price Administrator." (Sec. 904(a).)

From the foregoing it will be seen that Congress did not adopt either the House or the Senate version of this

bill but provided that it was "unlawful" to violate the Act or any regulation or price schedule.

Another contention urged by Denunzio was that the O.P.A. ceiling was $2.53 a lug and not $2.50 a lug. The provisions of the price regulations and ceiling are set forth under subdivision III of the brief entitled *"Statutes and O.P.A. Regulations Involved."* Crane was a broker or car-lot distributor and his ceiling would be $2.40, plus a 10¢ markup, as shown by Table 2, Column 8 of Table A. Kazanjian was a grower-packer and in the event he sold "through a broker or salaried representative" then his markup would be 13¢ above the $2.40 base. (Column 9.) In view of the fact that Kazanjian was not paying Crane or any other person for making the sale it cannot be contended that the sale was being made "through a broker or salaried representative." The sale, if made by Kazanjian, was a direct sale without a broker and his markup was 10¢a lug under Column 8. The purpose of granting a grower-packer a 13¢ markup was because he was put to an expense in connection with the sale, that is, the payment of a commission or the salary of a salaried representative. There being no expense to Kazanjian there was no reason for him being entitled to the 13¢ markup.

The next contention urged by Denunzio was that a contract is presumed to be lawful. We have no quarrel with this contention.

The next contention urged by Denunzio is that if illegality does not appear on the face of the contract, the illegality must be alleged and proved. Our answer to this contention is threefold: first, invalidity was alleged; second, the case was tried on the theory that the contract

was illegal, and third, when illegality appears the Court must refuse to entertain the action. [R. pp. 49-50.]

The case was tried on the theory that the contract in question was invalid. This is shown by Judge O'Connor's opinion. [R. pp. 101-2, 120 to 129.]

Where an action is tried and evidence introduced on the theory that a material issue has been raised and the Court renders a judgment on that theory, the parties will not be allowed to say for the first time on appeal that there was no such issue.

See the following cases:

Grimes v. Nicholson, 71 Cal. App. 2d 538, 162 P. 2d 934;

Schroeder v. Mauzy, 16 Cal. App. 443, 447, 118 Pac. 459;

Sprigg v. Barber, 122 Cal. 573, 579, 55 Pac. 419;

Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 285, 297, 47 Pac. 60;

National Union Fire Ins. Co. v. Nason, 21 Cal. App. 297, 299, 131 Pac. 755.

Whenever illegality appears in the course of a trial it becomes the duty of the Court to refuse to entertain the action. This rule is supported by the following authorities:

6 *Cal. Jur.,* p. 162, Sec. 112;

Dean v. McNerney, 91 Cal. App. 206, 266 Pac. 975;

Endicott v. Rosenthal, 216 Cal. 721, 16 P. 2d 673;

Morey v. Paladini, 187 Cal. 727, 203 Pac. 760.

The cases which were relied upon by Denunzio before the Court of Appeals in connection with this point are all cases where the question of illegality had not been tried by the lower court and was presented for the first time on appeal. The Appellate Court in each instance refused to consider same.

The next point urged by Denunzio before the Court of Appeals was that no evidence of illegality of contract was introduced. The evidence on the so-called replacement cars shows that one car contained 1100 lugs, and the other two cars each contained 1105 lugs. [R. pp. 42, 47, 48.] The evidence before the trial court showed that a carload of grapes contains from 775 lugs to 1170 lugs and that the average car contained 1100 lugs. This evidence clearly justified Judge Carter holding that the price Denunzio agreed to pay was $2.5454 a lug, which was clearly in excess of the O.P.A. ceiling and illegal. [R. p. 177.]

The next contention urged by Denunzio was that the contract price did not exceed the O.P.A. regulations by more than 6/100 of 1%. As heretofore pointed out, the price ceiling was $2.50 a lug on a sale by either Kazanjian or Crane and the overcharge is 1.816% of the sale price of each lug, based on 1100 as the average number of lugs in the car.

In view of the fact that the Emergency Price Control Act and the Maximum Price Regulations were adopted to "stabilize prices" "in the interests of national defense and security" and necessary to the "effective prosecutior

of the present war," it is clear that the *de minimis* doctrine would not apply. It was a matter of public concern to keep prices down.

The next point urged by Denunzio was that the Court may use its discretion in applying the statutory remedy provided by the Emergency Price Control Act and may use its discretion in applying remedies not called for by the statutes. An examination of the Emergency Price Control Act and the cases relied upon by Denunzio will show that this contention only arises on the matter of an injunction—not an action for damages for breach of contract.

The next contention urged by Denunzio is that the contract is severable and the legal portion may be enforced.

In Judge O'Connor's opinion he pointed out that the contract had two objects, one the sale of grapes and the other the payment of a commission to Crane. that the contract for the sale of grapes was at the ceiling price and therefore valid, but the contract to pay Crane a commission was void. [R. p. 129.]

We submit that the contract, if Crane negotiated one, was for the sale of grapes, that all Denunzio was interested in was procuring grapes, and all Crane and Kazanjian were interested in was selling grapes. The purchase and sale of grapes were the only objects of the contract. The payment of a commission to Crane was only an incident to the contract—it was not an object of the contract.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that justice may be done, and that to such end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the Ninth Circuit, and reverse same and direct that the judgment of Judge James M. Carter be reinstated.

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